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Supreme Court of the United States

October Term, 1959

JAMES SANTORE, PETER CASELLA, EMILIO MARIA, JAMES LEO MASSI, JOSEPH PAUL LO PICCOLO and LORENZO ORLANDO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Opinion of Affirmance of United States Court of Appeals for the Second Circuit. ——. F. 2nd ——. United States Court of Appeals. Second Circuit Opinions. October Term 1958. #206. Page 2147

Lodge Appeal Press, Inc., 65 Duane Street, N. Y. C. WOrth 2-0689.

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 206—October Term, 1958.

(Argued January 22, April 7, April 9, 1959
Decided October 2, 1959.)

Docket No. 25330

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES SANTORE, PETER CASELLA, EMILIO D'ARIA, JAMES LEO MASSI, JOSEPH PAUL LO PICCOLO, ANTHONY EDWARD TARLENTINO, NICHOLAS NARDUCCI, and LORENZO ORLANDO,

Appellants.

Before:

HAND and WATERMAN, *Circuit Judges*,
and BYERS, *District Judge*.

The several defendants severally appeal after trial without jury from judgments of conviction for alleged violations of 21 U. S. C. §§173, 174, Southern District of New York, Noonan, *J*. The indictment contained four counts alleging substantive offenses and a fifth count alleging conspiracy. The trial court found each defendant guilty as charged. The several appeals were heard by the same panel of this court, and have been considered together. The convictions below of Peter Casella and Ignazio Law-

rence Orlando, of James Santore on Counts 1, 3 and 5, and of Joseph Paul Lo Piccolo on Count 5 are unanimously affirmed. The convictions below of Emilio D'Aria and James Leo Massi are affirmed by a majority of the Court, Judge Hand dissenting. The convictions below of Anthony Edward Tarlentino and Nicholas Narducci, and on Count 2 of James Santore and Joseph Paul Lo Piccolo are reversed by a majority of the Court, Judge Byers dissenting.

ARTHUR H. CHRISTY, U. S. Attorney, Southern District of New York (William Desmond Walsh, Spec. Asst. U. S. Attorney; Kevin Thomas Duffy, George I. Gordon, Asst. U. S. Attorneys, of counsel), *for Appellee.*

THOMAS A. SHAW, JR., New York City, *for appellants Santore and Orlando.*

JACOB KOSSMAN (Stanford Shmukler, of counsel), Philadelphia, Pa., *for appellant Casella.*

CURRAN, MAHONEY, COHN & STIM (Menahem Stim, of counsel), New York City, *for appellants D'Aria and Massi.*

MAURICE EDELBAUM (Chester E. Kleinberg, of counsel), New York City, *for appellant Lo Piccolo.*

STUART H. JOHNSON, JR., New York City, *for appellants Tarlentino and Narducci.*

WATERMAN, *Circuit Judge:*

On February 5, 1958 an indictment was filed in the Southern District of New York charging all of the appellants herein and three others with violations of 21

U. S. C. §173[1] and §174.[2] Count One of the five count indictment alleged that Peter Casella, James Santore, Emilio D'Aria and James Leo Massi sold 17 ounces, 161 grains of heroin on October 21, 1957. Count Two charged Peter

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1. The pertinent portion of 21 U. S. C. §173 reads as follows:

§173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures. It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

* * * * * *

2. 21 U. S. C. §174 reads as follows:

§174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Casella, Joseph Paul Lo Piccolo, James Santore and Ignazio Lawrence Orlando with the sale of 16 ounces, 390 grains of heroin on December 11, 1957. In the third count Peter Casella and James Santore were accused of selling 9 ounces, 197 grains of smoking opium on December 19, 1957. Nicholas Narducci, Anthony Napolitano, Ignazio Lawrence Orlando, Anthony Edward Tarlentino and Nicholas Tolentino were charged in Count Four with the possession on January 21, 1958 of 6 pounds, 6 ounces, 302 grains of heroin. And the fifth and last count charged all of the above and Lorenzo Orlando with conspiring from September 1957 through January 1958 to conceal, possess, buy, and sell a quantity of narcotic drugs, the exact amount and nature thereof being unknown. The indictment also listed thirty-two overt acts alleged to have been undertaken in pursuance of the conspiracy charged in Count Five.

Anthony Napolitano and Nicholas Tolentino were not apprehended. The remaining indictees waived a jury and went to trial on June 3, 1958 before a district judge sitting without jury. On July 3, 1958, after seventeen days of trial, the court found each of the defendants guilty as charged. All but Ignazio Lawrence Orlando are contesting their convictions on this appeal.

The facts of this case are lengthy and involved, spelling out as they do the sordid story of large scale trafficking in narcotics, but as the appellants contend that there was insufficient evidence to support their convictions, and as Santore presents to us the defense of entrapment, rejected below, we must go into the facts in some detail. The district court accepted the testimony of the Government's witnesses throughout, even where their testimony was contradicted by defense witnesses, and since from our perusal of the record that acceptance seems reasonable

enough, we state the facts as they were presented at trial by the Government.

Michael Picini, an agent of the Federal Bureau of Narcotics, first met Santore on February 26, 1957 at the 39th Ward Independent Republican Club in Philadelphia, Pennsylvania. Picini introduced himself as an out-of-town narcotics peddler, mentioned the name of a friend of Santore in Baltimore, and expressed a desire to buy a sample quarter kilo of heroin. After at first stating that "his people wouldn't sell less than a half kilo," Santore finally fixed a price of $3,500 for a quarter kilo and told Picini to let him know when he was ready to buy. Subsequently, at a second meeting on March 4, 1957, Santore reintroduced the subject of narcotics by asking Picini if he was still interested in purchasing heroin.

On March 8, Santore introduced Picini to Frank Valli, a Philadelphia drug trafficker. At that time, however, no agreement to purchase was made. On March 20, Picini introduced another agent, Eugene Marshall, to Santore and Valli, describing him as his partner. During the evening of the 21st arrangements were made for the purchase of six ounces of heroin, and the agents gave Santore an agreed price of $3,150. Two days later, following Santore's instructions, the agents picked up the drugs. A second sale consisting of one-sixth of a kilo of heroin was made on April 3.

After the second sale the agents told Santore that they were dissatisfied with the quality of the drugs they were receiving, and he thereupon introduced them to another local trafficker, Frank Malfi. Following this meeting two purchases of heroin, one-quarter of a kilo on July 25 and one-half kilo on August 22, were made through Santore and Malfi.

Picini and Marshall advised Santore that they still were not satisfied with the drugs being supplied them by Philadelphia peddlers, and insisted that Santore take them directly to his New York "connection." Santore did not respond to the agents' demand immediately but finally offered to make the introduction in return for $2,000. On October 16, 1957, Santore introduced the agents to Peter Casella, who offered to supply them with any amount of pure heroin they desired. He stated that this pure heroin could be supplied in "amounts anywhere from half a kilo to a ton * * * with the quality just as it comes off the boat" and he set its price at $11,000 a kilo. After some discussion Casella instructed the agents to meet him on October 21st at the Hotel Lexington in New York City. The agents were to park their automobile in the parking lot across the street from the hotel and the heroin was to be placed in it.

About 4:30 P.M. on October 21, Santore and Casella were seen conversing with Emilio D'Aria in front of the Hotel Lexington. After a brief discussion Santore and D'Aria entered D'Aria's car and drove off together.

At 6:00 P.M. Marshall arrived at the parking lot and was met by Santore who gave him a package from his pocket containing one-half of a kilo of pure heroin. After Marshall placed the package in the trunk of his car, he informed Santore that he was then unable to pay for it because Picini, who had the funds, was in a Trenton hospital. This story was repeated to Casella in the hotel cocktail lounge. He at first insisted that the drugs would have to be removed from the car and returned to him, but, after the problem was discussed over dinner at a restaurant, Casella finally agreed that Marshall could keep the drugs on consignment if Casella's "New York partners" gave their consent to it.

Casella left Marshall and Santore to wait while he went to see his partners, and was followed to the Paddock Bar on Broadway. He seated himself at the bar and a government agent sat down one stool away. D'Aria and James Leo Massi then entered the bar, joined Casella, and engaged in conversation with him.

After an initial greeting, Casella said: "I don't have the money. One of them got sick and his partner came alone." D'Aria then asked, "Where is the package now?"— and Casella replied, "It's in the trunk of their car on the East Side. They're good for the money." There was still some hesitation on Massi's part, and Casella then stated, "Look, they're going to give me the money tomorrow. You come down on Wednesday and you'll get your money." After the three had apparently agreed to Casella's plan, the seated agent got up and left the bar.

After some additional twenty minutes of conversation Casella, still under surveillance, left the Paddock Bar and returned to Marshall and Santore. He told them that he had convinced his partners that Marshall could keep the package, but that full payment for it must be had by October 23 when the partners were going to Philadelphia for their share of the purchase price.

October 23 Marshall met Santore in Philadelphia and told him that in order to get the money he and Casella would have to accompany Marshall to where Picini was staying, at the King Kole Motel in New Jersey. The agent and Santore then picked up Casella at a flower shop in Philadelphia. At first Casella did not want to leave with them, for he was expecting the arrival of his partners from New York, but he finally agreed, and the three drove to the King Kole Motel. There Picini paid Casella $5,500 for the narcotics and paid Santore an agreed-upon $1000 bonus, in lieu of the promised $2,000

On that same day agents followed D'Aria and Massi from New York to Philadelphia where they went directly to the flower shop. There they waited for Santore and Casella until the latter two returned from New Jersey.

During the month of November the agents and Santore and Casella discussed the possibility of a partnership for the sale of opium—from Turkey and the best available "called red Turkey smoking opium"—but nothing came of the discussions. The agents desired to see an opium "sample," but Santore indicated a delivery of one would be delayed. Toward the end of that month, however, at Santore's urging, tentative arrangements were made for another purchase of heroin.

In New York, on December 10, the two agents met with Santore and Casella at the Hotel Edison to discuss the details of this heroin purchase. At dinner that evening at a restaurant Casella announced that he had to call his "connection." After telephoning, he stated that his connection would be there shortly, and that the connection was the same person who had supplied the heroin for the October 21 sale. Soon Joseph Lo Piccolo entered the restaurant and Casella joined him immediately. After some discussion with Lo Piccolo Casella returned to the table and said that everything had been arranged and that all he needed to know was the quantity to be delivered.

The next day Picini told Casella that he wanted to purchase another half kilo, and the latter said that he would see his connection about it. Casella was then followed to the apartment house where Lo Piccolo had an apartment. He remained inside the building for half an hour. Upon his return to the hotel where Santore, Marshall and Picini were waiting he said that the drugs would be delivered that evening at 9:00 P.M. It was agreed that the drugs were to be placed in a bureau drawer in the agents' room at the Hotel Edison while they were absent from it. To

enable the delivery to be made in this manner Marshall gave Casella his room key, and the latter said that he would "give the key to his people." Casella then proceeded to the same apartment building that he had entered earlier in the day, and upon his return told Marshall that he had given the key to his supplier and that the delivery would be on schedule.

At 9:00 P.M. that evening Ignazio Lawrence Orlando entered the hotel, went to the agents' room, unlocked the door, entered, and closed the door behind him. A few minutes later he came out of the room and left the hotel. As he went by Casella and Marshall, who were standing outside, Casella said "Everything is all right, the stuff is in the room." Ignazio Orlando then got into a car in which Lo Piccolo was already seated and drove to the latter's apartment building. There Orlando alighted, went into the basement garage, got into his own car, and drove away. Lo Piccolo drove off in the car they both had been in.

No one had gone into the agents' room except Ignazio Orlando. When the agents looked in the bureau they found a package containing a half-kilo of heroin. Picini then, at Casella's direction, gave $6,000 to Santore.

On December 18 Santore informed Marshall that the opium sample was now "in New York." The next day Marshall picked up Santore and Casella in Philadelphia and drove them to New York City. En route Casella stated that he could now supply raw opium at $1300 a kilo, or smoking opium at $450 per four ounce can. In New York Casella said that he had to go to his connection's home to get the samples. He fixed a $900 price to be paid to Santore. Picini paid Santore. Casella and Santore were then followed to Lo Piccolo's apartment house, and Casella went to the door of apartment 7K where Lo

Piccolo lived. Although Casella was not observed after he stopped in front of the door of 7K, a doorbell rang, voices were overheard, and a minute later Casella had disappeared from the corridor. Some minutes later Santore, who had remained on the ground floor in the lobby, came out of the building with Casella and gave Marshall two cans of prepared opium.

Tentative plans were made between Marshall and Picini and Casella and Santore on January 3, 1958 for the sale of additional heroin and opium, and on January 8 an advance payment of $1500 was made by Picini to Santore at Casella's direction. Arrangements were then made looking toward January 21 as the tentative date for a delivery of these drugs by the New York connection to Santore; Santore was to then transport them to the agents at the King Kole Motel.

About 7:00 P. M. on January 20th Ignazio Orlando drove to the home of his father, Lorenzo Orlando, at 164 Hill Street, Elmont, Long Island. A minute or two after he entered the house a light flashed on in the attic and remained on for about two minutes. Shortly thereafter Ignazio Orlando emerged from the house carrying a package similar in appearance to another package he had been observed delivering to Lo Piccolo's apartment a few hours earlier. Ignazio Orlando put the package in his car, drove to a place in the Bronx, parked his car, met Anthony Napolitano and transferred the package to the trunk of the latter's parked car. Orlando then drove off and Napolitano walked away.

Later that evening Anthony Edward Tarlentino and Nicholas Narducci were observed in the former's car, driving back and forth past Napolitano's car, and then parking for about twenty minutes across the street from it. Tarlentino then drove off and parked again a block away.

Narducci emerged and after walking past Napolitano's car to the next corner and then back to it, began to open its trunk. Just as he was doing so, and was starting to lift out the package, federal agents drove by. Narducci released the package, closed the trunk, and returned to Tarlentino's car. They then drove away.

Tarlentino dropped Narducci off in Manhattan and then proceeded to the Bronx where he entered a bar and met Napolitano and Nicholas Tolentino. Tarlentino was overheard by an agent to say, "the kid got scared and left the package in the car" and according to the agent Tolintino replied that "they would look around, and when it looked all right, they would take the stuff away." Early the next morning Tolentino and Napolitano attempted to drive Napolitano's car away. Federal agents tried to apprehend them and gave chase. The defendants escaped, but the agents recovered the car. The package in the trunk was found to contain six and one-half pounds of pure heroin—2.94 kilograms.

Tarlentino and Narducci were arrested on the morning of January 21, and, in the custody of the agents, gave inconsistent accounts of their actions of the night before. Tarlentino stated that he took Narducci with him to a bar to keep a date with a young lady, but not finding her at the appointed place he took Narducci directly home and then returned to the bar. Narducci claimed that he had followed Tarlentino's instructions in attempting to pick up the package, and that he was unaware of its contents. When he saw the agents he thought they were police and became frightened. After making these statements, however, Narducci admitted that everything he was saying was untrue.

On January 22, at about 9:15 P.M., Ignazio Orlando and Lo Piccolo went to the home of Lorenzo Orlando.

Shortly after the two men entered the side door of the house a light went on in the attic for a brief period. A few minutes later the two men came out of the house together, placed a package in the trunk of Ignazio Orlando's car, and drove away. Agents attempted to follow, but soon had to discontinue surveillance.

About 2:00 A.M. on January 23, Santore arrived at the King Kole Motel on the Black Horse Pike in New Jersey. On instructions from Santore Marshall picked up a package from the back seat of Santore's car similar in size and shape to the package Lo Piccolo and Orlando had placed in Orlando's car several hours earlier. The package Marshall received was found to contain almost eleven pounds of pure heroin and four jars of smoking opium. Santore asked for $8,000 and was then arrested.

Lo Piccolo too on January 23, at 4:30 A.M., was also placed under arrest and was handed a copy of a search warrant for his apartment. He denied that he knew Ignazio Orlando and stated that during the evening he had just been around the city—"nowhere in particular." The agents discovered in Lo Piccolo's apartment some eight to twelve hundred dollars, and he had a map of New Jersey with the penciled notation, "Haverton four miles, Black Horse." Ignazio Orlando was also apprehended that morning when he arrived at his home.

At about the same time that Lo Piccolo and Ignazio Orlando were being arrested, agents armed with a search warrant went to the side door of Lorenzo Orlando's home. When Lorenzo came to the door he was shown a copy of the search warrant and the agents proceeded upstairs to the attic. After searching two small attic bedrooms in the presence of Orlando and his wife, the agents discovered a locked door in the bathroom. Orlando attempted to dissuade the agents from opening that door by stating that

it was the bedroom of a tenant, by denying that he had a key, and, finally, by placing himself between the agents and their objective. However, the agents forced open the door and discovered, instead of bedroom furnishings, a steamer trunk, and on it a suitcase containing over nineteen pounds of pure heroin and one pound of opium. When asked about this discovery Lorenzo Orlando stated that the contents of the suitcase were indeed narcotics and admitted ownership. Within the trunk was a complete set of laboratory equipment for the dilution and preparation of narcotics. An agent searching the basement of the house located a box containing a number of empty glassine bags, some of which contained traces of heroin. And while one of the agents was passing Orlando clothing which he had indicated he wanted to wear, the agent discovered in the pocket of the overcoat a skeleton key which opened the lock of the attic room.

When Lorenzo Orlando was subsequently interrogated he was unable to give the last name of the alleged tenant who was supposed to have occupied the attic room. And, although the door to the attic room led off the bathroom which the Orlandos apparently used, Lorenzo Orlando admitted that he had not told his wife that anyone was living in the room.

This, then, in the main, is the background of the case. Certain contentions of the appellants require a more complete statement of particular facts, but that can best be deferred until the point in question is discussed. Each of the appellants makes various individual arguments; and all, in conclusion, incorporate, where applicable, the arguments of the others.

I The Sufficiency of the Evidence

Section 174 of Title 21 makes it a crime for any person to receive, conceal, buy, sell or in any manner facilitate

the transportation, concealment or sale of any narcotic drug imported contrary to law when that person has knowledge of that narcotic drug's illegal importation. *Torres Martinez* v. *United States*, 220 F. 2d 740 (1 Cir. 1955); *Kalos* v. *United States*, 9 F. 2d 268 (8 Cir. 1925). The section also states that it shall be a crime to conspire, apparently with the same knowledge, to commit any of these activities. And, as an aid to the enforcement of this section, Congress has provided that "[w]henever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

A. *Peter Casella.*

We have no difficulty in determining that the defendant Peter Casella actively participated in the sales of narcotics and that he was a member of a conspiracy dealing with narcotic drugs. And, as to Count Three, wherein he was charged with a sale of smoking opium on or about December 19, 1957, there was sufficient evidence to support a finding that the opium then sold was illegally imported and that Casella knew it. In November Casella told the agents that through connections with a smuggler he could get them opium from Turkey, and, at dinner on December 11, he stated that while the opium was in port it had not yet been unloaded. Too, just before the sale, on December 18, Santore told Agent Marshall that the opium sample was now in New York.

However, as to Counts One and Two, charging sales of heroin, there is no evidence in the case that the heroin was illegally imported or that defendant knew it to be contraband. The Government recognizes this inadequacy of its proof, and it urges us to rely upon the statutory presumption, contained in section 174. It argues that even though

it was not shown that Casella ever physically held the heroin, or had personal custody of it, his position in the conspiracy was such that he had the "possession" the statute contemplates. Defendant, of course, takes the opposite view. He contends that he did not have actual possession of the heroin and therefore the presumption cannot operate against him with respect to it.

We have on two occasions indicated that personal custody or manual possession of narcotics by a defendant is not essential in order to bring the presumption into operation against him—that is, the drugs may physically be held by one person and possession still be in another. *United States* v. *Moia*, 251 F. 2d 255 (2 Cir. 1958); *United States* v. *Cohen*, 124 F. 2d 164 (2 Cir. 1941), *cert. denied*, 315 U. S. 811 (1942). And see *Gallegos* v. *United States*, 237 F. 2d 694 (10 Cir. 1956). While these decisions are not, perhaps, conclusive authority, for they deal with this issue in passing and without extended discussion, we follow them. The view they indicate to be the sound one is in accord with what we consider to be the proper and reasonable interpretation of the word "possession" as it is used in this particular statute. So interpreted, "possession" includes not only immediate physical control but also that control which is exercised through agents.

It is well recognized both in civil and criminal law that the word "possession" may encompass both types of control. See, e.g., *Nat. Safe Dep. Co.* v. *Illinois*, 232 U. S. 58 (1914); *People* v. *Brennequer*, 166 N. Y. S. 801, 101 Misc. 156 (1917); *Commonwealth* v. *Smith*, 187 Pa. Super. 4, 144 A. 2d 253 (1958); *Bennett Chevrolet Co.* v. *Bankers & Shippers Ins. Co.*, 190 Atl. 863 (Sp. Ct. R. I. 1937); *Reynolds* v. *Roberts*, 57 Vt. 392 (1885); *Black's Law Dictionary* (4th Ed. 1951). And while it is true that we should strictly construe criminal statutes, we are surely permitted to define a term that has long had a recognized

meaning in the law in a manner consistent with that recognized definition.

Moreover, it should be remembered that this presumption, which greatly favors the Government, was written into the section because Congress undoubtedly believed that drug trafficking should be stamped out, and that convictions of persons engaging in that traffic should be more easily obtained. Also, section 174 makes possible the imposition of the same heavy penalties provided for in that section upon those found guilty of conspiring to engage in the illicit drug traffic as upon those found guilty on substantive counts. This clearly indicates a Congressional belief that all the members of a narcotics conspiracy, not only those caught "red handed" concealing, buying, selling and transporting the drugs, have equally outraged society. Therefore we would be stultifying the Congressional intent if we should hold that Congress intended the word "possession" in this statute to be defined so as to only secure easier convictions of those members of a conspiracy, often few in number, who are shown to have had personal custody of the narcotics.

Defendant Casella points to 26 U. S. C. §§4704(a), 4705 (a), and 4721-24, Sections of the Internal Revenue Code, and argues that since convictions can be obtained under these provisions without proof that the narcotics were imported contrary to law to the defendant's knowledge, section 174 should not be interpreted as we are now interpreting it. Any thought that Congress intended these Internal Revenue provisions as a substitute for 21 U. S. C. §174 is defeated by 26 U. S. C. §4734, which provides:

> "Nothing contained in sections 4701 to 4707, inclusive, or sections 4721 to 4726, inclusive, shall be construed to impair, alter, amend or repeal any of the provisions of the act approved February 9, 1909, en-

> titled 'An Act to prohibit the importation and use of opium for other than medicinal purposes' (c. 100, 35 stat. 614; 21 U. S. C. 171-185), * * * and any amendment thereof."

This presumption of illegal possession of imported narcotics so set forth in 21 U. S. C. §174 casts the burden of going forward upon the accused to disprove importation, but it does not appear that our interpretation of this statutory presumption endangers its validity. In *Yee Hem* v. *United States*, 268 U. S. 178 (1925), the Supreme Court, in dealing with a provision couched in almost identical language, set out the following canon:

> "'That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.'"

It is just as "rational" and "reasonable" to infer the fact that narcotics are contraband, and that defendant had knowledge thereof, from the fact that defendant had control over them while held by another as it is to so infer because a defendant had personal or physical custody of them.

The question we must therefore answer with respect to Casella's conviction under Counts One and Two is whether the Government presented evidence sufficient to support a finding that Casella was in a position to exercise control over the heroin sold on October 21, and on December 11, 1957. While it is clear that Casella was not in sole control of the heroin sold on those dates we think it equally clear

that, together with others, he exercised some dominion over it. Casella was a full partner in the conspiracy, not simply a hired agent, and he had at least partial control over what was to be done with the contraband handled by the group. A clear illustration of his position can be seen in the events of October 21. When Marshall was unable to pay for the drugs delivered, Casella, in conjunction with his "New York partners," was able to let them go on consignment. And there is no reason for believing that this control, exercised as a result of his role in a continuing conspiracy, did not extend to the narcotics subsequently handled by the group. In our opinion Casella was, for purposes of section 174, in possession of heroin on the dates charged in Counts One and Two of the indictment. Since he made no attempt to "explain" his possession on those dates he was properly convicted.

And inasmuch as the proof of his activities that supports the Government's case on Counts One, Two and Three is also applicable to the conspiracy charge under Count Five, we also affirm the Count Five conviction.

B. *James Leo Massi and Emilio D'Aria.*

The main evidence against the defendants Emilio D'Aria and James Leo Massi is the testimony of the Narcotics Agent with respect to the conversation which he stated that he overheard between those defendants and Casella in the Paddock Bar on October 21, 1957. Both D'Aria and Massi took the stand and denied the conversation testified to by the agent, but, as we have stated above, the district court chose to believe the agent. Taken in connection with the other testimony properly bearing upon their guilt, and in context, this conversation was properly interpreted as showing the participation of D'Aria and Massi in the sale of heroin on that day and their membership in the overall conspiracy. Less than two hours before the scheduled delivery on October 21st D'Aria met Santore at the

place of transfer. After a brief conversation D'Aria and Santore drove away. An hour later Santore returned with the package of drugs in his possession. Immediately after Casella told these defendants in the bar that they would have their money by October 23rd Casella returned to the agents and told them to make payment to him by that date. Also, there is the trip to Philadelphia by D'Aria and Massi and the meeting with Santore and Casella on the date when the agents made payment for the October 21 delivery. While it is true that this evidence only relates to the first sale undertaken by the group, and only establishes that these defendants were at that time members of a conspiracy, they made no attempt to show that they ceased thereafter to be members.

There is no evidence proving that D'Aria and Massi had knowledge that the heroin was contraband, but the import of their conversation reveals that these two defendants, like Casella, exercised proprietary control over the narcotics. This is especially clear when the Paddock Bar conversation is viewed in the light of Casella's references to his "partners"—hearsay statements admissible against D'Aria and Massi because of the established joint enterprise. Under the rationale stated above with respect to the defendant Casella, it is clear that these two defendants had "possession" of the heroin prior to the time when it was turned over to Agent Marshall. And, under section 174, they, therefore, had the duty of going forward and establishing their innocence. This they failed to do.

C. *James Santore.*

With respect to Count Three charging a sale of smoking opium on December 19, 1957, there is direct proof of the guilt of James Santore. He took an active part in making arrangements for the sale and in the transaction itself, and the requisite knowledge of the illegal importa-

tion is established by the fact that he was present when Casella mentioned that he could get opium from Turkey through his connection with a smuggler. Similarly, there was evidence to establish Santore's guilt under Count Five, the conspiracy charge, to the extent that he was a member of a conspiracy to sell opium knowing it to have been imported contrary to law.

As to Count One, charging a sale of heroin on October 21, 1957, Santore's conviction, like the convictions of Casella, D'Aria and Massi, is affirmed because he did not overcome the statutory presumption contained in section 174. He physically delivered the heroin sold on that date to Agent Marshall, and had unquestioned possession of it.

Santore's conviction under Count Two, however, must be reversed. There is no evidence showing that he had possession of the heroin sold on December 11, or that he knew it was contraband. Unlike the transaction of October 21st, Santore did not actually deliver the December 11 drugs; and, as far as the record reveals, he was not a member of the conspiracy in the sense that he had a voice in deciding, or could control, what was to be done with the narcotics. On the contrary, Santore functioned only as an intermediary between the agents, as purchasers, and Casella and his partners, as sellers. For instance, on October 21 when Agent Marshall was trying to defer payment for the heroin delivered to him, Santore's permission was not sought. The defendant was, without question, an active member in the criminal conspiracy, but his membership therein was not such that, absent physical custody of the drugs, he exercised that type of control over them and their disposition which we hold constitutes possession.

D. *Joseph Lo Piccolo.*

The defendant Joseph Lo Piccolo was indicted under Count Two for engaging in a sale of heroin on December

11, 1957, and under Count Five for being a member of the narcotics conspiracy. Despite his vehement protestations to the contrary, there is no doubt in our minds that the Government established his participation in that sale and that he was a member of a drug peddling conspiracy. At dinner on the evening of December 10th, Agents Marshall and Picini and defendants Santore and Casella were discussing a purchase of heroin. During dinner Lo Piccolo entered the restaurant, and Casella left the table to talk with him. When Casella returned to the table he was able to state to the agents that everything concerning the proposed transfer of the narcotics had been arranged. The next morning when Casella learned the amount of heroin the agents desired he went to the apartment building where Lo Piccolo lived; and upon his return he stated that the heroin would be delivered at 9:00 that night to the agents' hotel room. Also, the agents' room key was taken by Casella to that building. That evening, upon leaving the hotel after delivering the drugs, Ignazio Orlando got into an automobile in which Lo Piccolo was seated, and drove that car to where his own car was parked in the basement garage of Lo Piccolo's apartment building. These events tie Lo Piccolo into the transaction of sale of December 11. Thereafter, on December 19, Casella went to Lo Piccolo's apartment to pick up opium and was overheard talking to someone in the apartment. On January 20, Ignazio Orlando carried into that apartment a package similar in shape and wrapping to other packages taken from the drug cache in Lorenzo Orlando's home. Immediately after the package arrived Lo Piccolo closed his window blinds. The last significant date before Lo Piccolo's arrest was January 22. That evening Lo Piccolo went with Ignazio Orlando to the home of the latter's father. A light went on and off in the attic, and shortly thereafter the two emerged carrying a package identical in size and shape

to the one in which drugs were discovered in New Jersey a few hours later. On being arrested the following morning, the marked map and the money were found in his apartment, and he denied knowing the defendant Ignazio Orlando. A trier of facts is not limited to drawing only those inferences most favorable to the accused, *United States* v. *Moia*, 251 F. 2d 255 (2 Cir. 1958). And when all of these various incidents of proof are viewed together, they justify the conclusion that Lo Piccolo was engaged with Casella and others in a joint enterprise. Lo Piccolo's involvement, demonstrated first by the evidence that he was engaged in the conspiracy, is overwhelmingly established when the hearsay references to Casella to his "connection" and "supplier," which then became admissible against Lo Piccolo, are considered.

But, as there was no evidence to show that Lo Piccolo knew that any of the drugs with which he or his fellow conspirators dealt, were contraband, we can sustain his convictions only if we can find that he had possession of the drugs. The record fails to establish that Lo Piccolo ever possessed heroin as early as December 11, 1957, physically, or by controlling the disposition of it, or otherwise. The drugs sold on that date were delivered to the agents' room by Ignazio Orlando. While it is quite likely that Orlando got the room key from Lo Piccolo there is no evidence tending to show that he also obtained the heroin from him. Similarly, there is no evidence tending to establish that, with respect to the heroin sold on December 11, Lo Piccolo had that type of control which we have seen was exercised by the defendants Casella, D'Aria and Massi. Consequently, his conviction on Count Two must be reversed.

But as to Count Five, since it involved a period of time extending beyond December 11, there was indeed sufficient evidence to justify a finding that Lo Piccolo was in posses-

sion of narcotics. On December 19, after stating that he had to obtain opium from his connection's home, Casella was followed to Lo Piccolo's apartment where he engaged someone in conversation and obtained two cans of prepared opium. On January 20, Ignazio Orlando carried a package similar in appearance to others transported from Lorenzo Orlando's home to Lo Piccolo's apartment, and, immediately after Ignazio Orlando's arrival, Lo Piccolo closed his window blinds. Finally, on the evening of January 22, Lo Piccolo, together with Ignazio Orlando, carried a box, identical in size and shape to the one in which drugs were discovered in New Jersey a few hours later, from Lorenzo Orlando's home to an automobile. After placing the box in the automobile, the two men drove off. Looked at in the light of all the other evidence presented, any one of these occasions justifies, in our opinion, the conclusion that Lo Piccolo was, during the time in question, in actual possession of narcotics, a possession which he did not "explain."

E. *Lorenzo Orlando.*

Lorenzo Orlando was convicted under Count Five, the only count on which he was indicted. Although he argues strenuously to the contrary, we hold that the evidence was adequate to support his conviction. A large cache of narcotics was found in a locked room in his house and a key to the room was found in his clothing. His attempts at first to keep the agents out of this room and his later statement to them that the suitcase contained heroin, plainly demonstrate that he had knowledge of the stored narcotics. Also, he admitted ownership of them. The district court was not required to believe that this was simply a selfless lie made in an attempt to prevent the involvement of wife and son. The proof supports the conclusion that Lorenzo Orlando was a member of the con-

spiracy and in possession of the narcotics found in his attic room.

F. *Nicholas Narducci and Anthony Edward Tarlentino.*

The two defendants Nicholas Narducci and Anthony Edward Tarlentino appeared on the scene only briefly, on the night of January 20, 1958 and the morning of the following day. As a result of this brief appearance the Government charged in Count Five that they were members of the conspiracy; and in Count Four that on or about January 21, 1958 they "unlawfully, wilfully and knowingly did receive, possess, conceal and facilitate the transportation and concealment of a narcotic drug." The evidence presented by the Government shows that on the night in question Narducci was observed furtively attempting to remove a package containing narcotics from the trunk of a parked automobile. Tarlentino then met with Napolitano and Tolentino and explained to them that "the kid got scared and left the package in the car." The next morning, upon their arrest, Narducci impliedly admitted that he knew that the package contained narcotics, and Tarlentino detailed a false story with respect to his behavior. While only Narducci can be said to have admitted knowing that the package contained narcotics, it is inconceivable that he would know the contents of the package while Tarlentino, the man who made contact with Napolitano and Tolentino, did not.

This proof was sufficient to justify a finding that these two defendants as alleged in Count Five were members of the group and were attempting, pursuant to an understanding with others, to remove a package of narcotics from an automobile, but we must reverse their convictions because there was no evidence whatsoever to indicate that they had knowledge that the drugs in the package were contraband drugs, and because we are not able to say from

this record that they were ever in possession, actual or constructive, of that package of narcotics or of any other narcotics handled by the group. The Government argues that Narducci's momentary grasp of the package constituted "possession" of it by him, and that at that moment the crimes with which he and Tarlentino were charged were completed. We cannot agree. A statutory presumption is valid only where there is a rational and not unreasonable connection between the ultimate fact to be presumed and the fact proved. *Yee Hem* v. *United States*, 268 U. S. 178 (1925), *supra*. The crime punishable under section 174 is not the possession of narcotics, but rather the transporting, concealing, receiving, buying or selling of narcotics; and, consequently, in order to make the statutory presumption contained in that section meet the test of validity we must define "possession" as used therein so as to include only that type of control from which it could not unreasonably be inferred that the possessor was going to commit one or more of the specified acts which have been declared criminal. Narducci's grasp of the package was clearly not such possession, for he voluntarily released it one brief moment later.

II The Defense of Entrapment

In his opening remarks to the district court, the defendant Santore raised the issue of entrapment by the federal agents. Having been rebuffed below, he now urges that defense upon us.

According to the Government's proof, Agent Michael Picini first met Santore on February 26, 1957 at the 39th Ward Republication Club in Philadelphia. At that meeting Picini stated that he had been recommended to Santore by a Baltimore friend of Santore named "T" and that he was interested in purchasing some heroin. Santore asked the

agent who he knew in Philadelphia and whether he was acquainted with Harry Riccobene. Picini replied that he had heard of Riccobene but did not know him. Santore then asked Picini how much heroin he wanted to buy, and upon being told a quarter kilo, stated that "his people" would not sell less than half a kilo. But after Picini told him that he would not make any large purchases until he first "tried the stuff," Santore set a price of $3,500 for a quarter kilo. Santore then told Picini where he could be reached, and Picini agreed to "let him know in a couple of days." All of this conversation took place in the bar there with other patrons standing 15 to 20 feet away.

The next meeting occurred on March 4, 1957, at the same place. Apparently this time it was Santore who broached the subject of narcotics. He asked Picini if he was still interested in purchasing heron, and told the agent to move out of the Essex Hotel because there "was too much law around there." Picini at that time was living in Philadelphia.

The parties met again, for a third time, on March 8, 1957. At this meeting Santore was accompanied by Frank Valle, and after the introductions Santore said to Valle, "This is the man I was talking to you about." Valle then inquired as to how much "stuff" Picini wanted to buy. Picini told him, and Valle then stated that Picini should call him that evening. Picini called as directed, but Valle told him that his connection was out of town and could not be reached.

On March 20, 1957 Picini again met Santore and Valle and accompanied them to a Chinese restaurant. At this meeting Santore stated that he had arranged for Picini to meet Harry Riccobene's brother that evening and asked for an advance of $200. That evening Picini went with Agent Marshall to the 39th Ward Independent Republican

Club. Santore led them into the kitchen, asked them for and obtained the $200, and stated that while the proposed meeting could not be had as planned that evening, definite arrangements had been made for "a buy."

On the following evening, another meeting took place at the same club. Santore announced that the heroin would be $525 an ounce; and, after some protestations as to the cost of it, Picini agreed to take six ounces. He then paid Santore $2,950 and they made arrangements to meet the next morning.

At the morning meeting Santore said "that his people had been delayed in New York and that the stuff . . . would be in Philadelphia some time that night." About 5:45 A.M. on March 23rd Santore called Picini and told him to go to the club. Picini accompanied by Marshall obeyed. At the club Santore got into the agents' car and directed them to a street intersection. When they arrived there Santore told them that the drugs were on the side porch of a luncheonette. Picini obtained them there. When they separated Santore told the agents to keep in touch with him.

Santore first attacks the plausibility of this evidence and mainly centers this attack upon the testimony relative to the initial meeting. While the writer of this opinion is astonished to learn how easily Agent Picini was able to effectively make his initial contact with Santore, we cannot say that the district court, after viewing the witness-stand behavior of Agent Picini and of the defendant who testified in his own behalf, was unjustified in believing that what Picini stated occurred actually did occur as stated. Certainly more than a reaction of mild astonishment would be required for us to intervene and set aside this fact-finding conclusion of an experienced trial judge. The Government's version of events subsequent to February 26

is readily believable and of course thereby lends plausibility to the testimony relative to the initial contact.

Accepting the facts as presented by the Government the facts do not support the defense of entrapment. It is well settled that government officers may employ artifice or stratagem to catch those engaged in criminal activities. *Sherman* v. *United States*, 356 U. S. 369 (1958); *Sorrells* v. *United States*, 287 U. S. 435 (1932). "Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials. • • • To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Sherman* v. *United States, supra.* Santore is clearly within the latter category. He was not reluctant to negotiate a sale of narcotics at his first meeting with Agent Picini. At their second meeting he raised the subject himself. The district court quite properly found that Picini did not persuade Santore to commit the crime and that he only provided the defendant with an opportunity which the latter was ready and willing to take advantage of. *Masciale* v. *United States*, 356 U. S. 386 (1958), *rehearing denied*, 357 U. S. 933 (1958).

Santore further maintains that even if he was not entrapped with respect to the first sale, we must find that the agents' "continued inducement" of him to arrange sale after sale entrapped him. True, the agents expressed dissatisfaction with the product supplied by Valle and Malfi, and they insisted that Santore take them to his New York connection. However, in view of defendant's apparent ready willingness to find new suppliers, and arrange new sales, we cannot say that that inducement constituted entrapment. We think the test to be applied to these subsequent relations is the same test that governs an initial contact between a government agent and a suspected crimi-

nal. The public policy which, within limits, permits government agents to practice the art of deception is not dissipated when one member of a criminal group has been discovered and discovery of the others through that contact is desired.

III The Legality of the Search of Lorenzo Orlando's Home

The defendant Lorenzo Orlando moved the district court to suppress all the evidence found by the agents during their search of his attic apartment and basement on January 23, 1958. He alleged that the search warrant under which the agents gained admission was illegal and that consequently the narcotics, equipment, etc. were the fruits of an illegal search and seizure. The district court denied this motion, and defendant assigns that denial as error on this appeal.

There most assuredly was probable cause for the issuance of the warrant. Twice the agents observed that shortly after a light went on in the second floor of the house at 164 Hill Street a package, subsequently found to contain narcotics, was carried out. The warrant stated that the applicant for the warrant had reason to believe that illegal narcotics were to be found "on the premises known as 164 Hill Street, Elmont, Long Island, New York, being a one family house, in the Eastern District of New York." However, it is defendant's contention that since the house was not a one-family house, but two-family, the basement and second floor being occupied by Orlando and his wife and the first floor by a family named Drago, the warrant did not describe the place to be searched with that particularity required by the Fourth Amendment. While there might be merit to this position were we dealing with the case of an ordinary multiple dwelling building, see *United States* v. *Hinton*, 219 F. 2d 324 (7 Cir. 1955), we think that under

the circumstances here the district court's ruling must be upheld.

The house at 164 Hill Street is to all outward appearances a one-family house with a front door and a side door, and it had always been registered with the local authorities as a one-family dwelling. A few years prior to the search the interior of the house was renovated and subdivided by Orlando, but, in contravention of local ordinances, no permission to do so was obtained from the proper authorities. Consequently no notice of this subdivision was ever given to the local officials.

In view of these facts we think that the issued warrant described the premises to be searched with that "practical accuracy" we have held to be necessary. *United States* v. *Fitzmaurice*, 45 F. 2d 133 (2 Cir. 1930). The description in the warrant was in accordance with the outward appearance of the structure, cf. *Carney* v. *United States*, 79 F. 2d 821 (6 Cir. 1935), and in view of the concealment by Orlando of the interior alteration made by him it would be absurd to say that the Government was on notice as to it. The agents were not warned of a possible dual occupancy of the house until after they had shown the copy of the warrant to Orlando and had entered inside. At that moment it was too late for them, consistent with the success of their mission, to have retreated and obtained a new warrant.

IV The Grand Jury Minutes

The defendants also seek a new trial on the ground that the district court committed reversible error in its rulings with respect to the grand jury testimony of government witnesses. In the court below the defendants requested that the grand jury minutes be given them directly under *Jencks* v. *United States*, 353 U. S. 657 (1957), and 18

U. S. C. §3500; or that, at the very least, the district judge read the minutes to determine whether there were any consistencies between the testimony the witnesses gave before the grand jury and that adduced at the trial. Both of these requests were refused.

We have previously held that neither *Jencks* nor 18 U. S. C. §3500 apply to grand jury minutes, *United States* v. *Spangelet*, 258 F. 2d 338 (2 Cir. 1958); *United States* v. *Angelet*, 255 F. 2d 383 (2 Cir. 1958); and the Supreme Court has recently expressed its agreement with this approach, *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395 (1959). Accordingly defendants' first request was quite properly denied. However, defendants' second request appears to be in accord with the position we took in *Spangelet*. There we said:

> "The district judge held that neither Jencks nor the statute enacted by Congress immediately after the Jencks decision, 18 U. S. C. A. §3500, authorized handing over grand jury testimony to defendant's counsel. The judge thereopon utilized the procedure which had prevailed before the Jencks case and inspected the grand jury testimony *in camera*. Finding no inconsistencies he then refused to give the transcript to the defense.
>
> "We hold that the district judge followed the proper procedure with respect to grand jury minutes." 258 F. 2d at 339.

In accord with our holding in *Spangelet*, therefore, we issued an order to the trial judge requiring him to read the grand jury minutes and to certify to this court whether, in his judgment, there were inconsistencies in the testimony of witnesses who testified both before the grand jury and at trial to warrant turning over to the defendants those portions of the grand jury minutes in which the in-

consistencies appeared; and, if there were such inconsistencies, whether in his judgment the failure to turn over those portions of the minutes containing them prejudiced the defense. In compliance with this order the trial judge certified that:

> "[A]ny inconsistencies that exist between the testimony of those witnesses who testified both before the Grand Jury and at the trial are of such a minor nature that I would not have ordered that they be delivered to defense counsel. I further certify that in my judgment the defense was in no way prejudiced by my refusal to order that they be surrendered to them."

We have reviewed both the trial transcript and the grand jury minutes, and we are in agreement with this certification. Accordingly, we hold that while the district court did not comply with the defendants' several requests that the grand jury minutes be turned over to defense counsel, and did not examine those minutes *in camera* during the trial in accord with the practice we approved in *Spangelet*, the defendants are not entitled to new trials. If the trial judge had read the grand jury minutes when requested to do so he would have ruled that the defendants could not examine them. In the present state of the law, this case not having been a jury case, we hold that this compliance with *Spangelet* by the trier of both law and facts is all the defendants are entitled to.

V Miscellaneous Points

The remaining points raised by defendants do not require extended discussion, and will be dealt with briefly. The first of these is the contention that the Government's proof revealed a prejudicial variance in that it showed the existence of multiple conspiracies rather than the one conspiracy that was charged in the indictment. Citing *Kot-*

teakos v. *United States*, 328 U. S. 750 (1946), defendants urge reversal on this ground. We do not agree that the proof presented revealed the existence of more than one conspiracy. For as we said in *United States* v. *Rich*, 262 F. 2d 415 (2 Cir. 1959):

> "The courts have [held] that persons can be involved in a conspiracy even though they do not know all the other members of the conspiracy or participate in each phase. Recognition is thus given to reality, namely, that there must of necessity be a division of labor and function by those engaged in this business. If there be knowledge by the individual defendant that he is a participant in a general plan designed to place narcotics in the hands of ultimate users, the courts have held that such persons may be deemed to be regarded as accredited members of the conspiracy."

And see *Poliafico* v. *United States*, 237 F. 2d 97 (6 Cir. 1956), *cert. denied*, 352 U. S. 1025 (1957), *rehearing denied*, 353 U. S. 931 (1957); *United States* v. *Tramaglino*, 197 F. 2d 928 (2 Cir. 1952); *cert. denied*, 344 U. S. 864 (1932); *United States* v. *Bruno*, 105 F. 2d 921 (2 Cir. 1939), *reversed on other grounds*, 308 U. S. 297 (1939). But even if we thought otherwise, the doctrine of Kotteakos would be inapplicable here. In that case the evidence showed the existence of at least eight separate conspiracies, and the court's decision was predicated upon possible confusion in the minds of the jurors. Here, trial was to the court without jury, there were at most only two separate groups of coconspirators, and the district judge was not confused as to the situation. In pronouncing judgment on the defendants he said:

> "I hold that all of the defendants were involved in one conspiracy. In view of the kind of operation and the nature of the product within this conspiracy, I

feel that the case of United States v. Bruno, 105 Fed. 2d 921, provides a guide. Thus it is not necessary that each defendant know the others or the existence of the others in the conspiracy, that knowledge being implied from the size and the character of the conspiracy. But if two separate conspiracies should be vaguely found or inferred, one involving Narducci, Tarlentino, Ignazio Lawrence Orlando, Lorenzo Orlando, Joseph Lo Piccolo, plus the two fugitives, and the other consisting of Ignazio Lawrence Orlando, Joseph Lo Piccolo, Lorenzo Orlando, Peter Casella, James Santore, James Leo Massi and Emilio D'Aria, it is my finding that the evidence against these defendants is sufficient to find them guilty, considering against each only the statements of the conspirators involved and the evidence adduced by the Government as to such conspirators."

The defendants Lorenzo Orlando, D'Aria and Massi argue that the district judge committed error when he denied a motion for a mistrial made after the trial was temporarily postponed at a time when the two Orlandos were taken to the Eastern District of New York and there adjudged guilty on a charge of possession of the narcotics discovered in Lorenzo Orlando's home. The basis of this contention, as we understand it, is that since this postponement occurred on July 3, the day the trial ended and judgment was to be pronounced, it was so likely that the district judge's decision would be influenced by the judgment rendered in the Eastern District that he should have had the trial begin anew. We cannot agree. There was substantial evidence against each of the Orlandos. And the district judge expressly noted that he was in no way concerned with the decision in the Eastern District but had resolved the issues before him on the basis of the evidence presented in his own court. We must credit our

federal trial judges with more independence of judgment than this argument suggests.

The defendant, Casella contends that the trial judge maintained a prejudicial attitude toward the defendants, and that this attitude, expressed in various comments, deprived them of a fair trial. However, when the remarks are looked at in context they do not support this contention, and we have not found other indications of such an attitude on the part of the trial judge. On the contrary, it is our considered judgment that he conducted a long and difficult trial in a fair and proper manner.

Joseph Lo Piccolo rested his case at the end of the Government's case. He argues that the district court committed reversible error as to him because it ruled that, though he put in no evidence in support of his cause, evidence damaging to him elicited from defense witnesses called by the other defendants would be binding upon him. We need not pass upon the merits of this contention for, in announcing its decision with respect to those defendants who presented no evidence in their own behalf, the court stated that it found them guilty on the basis of the Government's proof alone. Our study and analysis of the evidence demonstrate to us the accuracy of this observation.

Casella and Santore make various contentions with respect to their sentences. Casella argues that he was but an aider and abettor, the conspiracy charge was in his case simply an alternative form of charging the substantive offenses, and therefore the imposition of a separate consecutive sentence on the conspiracy count was improper. But this too is an argument with which we need not deal. Casella was sentenced to terms of twenty years on each of Counts One and Two to run concurrently with each other; and twenty years each on Count Three and Count Five to run concurrently with each other, but consecutively

to the serving of the sentences on Counts One and Two. Thus Casella's argument overlooks the fact that one of the terms of imprisonment ordered to run consecutively embraces a substantive count and that the sentence on the conspiracy count runs concurrently with that term.

Santore argues that all of the various sales of narcotics in which he participated in Pennsylvania, New Jersey and New York constituted a single continuous transaction, and that it was improper for the district court to have ordered the twenty year sentence imposed upon him to run consecutively to the sentences imposed in Pennsylvania and New Jersey for the violations committed in those states. But while these sales may have all been part of one overall continuous transaction, they were each a crime punishable separately under 21 U. S. C. §174. And it is well settled that a court may provide for a sentence to begin at the expiration of one then being served. *Ponzi* v. *Fessenden*, 258 U. S. 254, 265 (1922); *Wall* v. *Hudspeth*, 108 F. 2d 865 (10 Cir. 1940); *Carrol* v. *Zerbst*, 76 F. 2d 961 (10 Cir. 1935); *Ex Parte Lemar*, 274 Fed. 160, 176-77 (2 Cir. 1921), *aff'd*, 260 U. S. 711 (1923); *United States* v. *Wright*, 56 F. Supp. 489 (E. D. Ill. 1944).

Defendants Santore, Orlando, Tarlentino and Narducci were represented on appeal by The Legal Aid Society, Thomas Shaw of counsel for Santore and Orlando, and Stewart Johnson of counsel for Tarlentino and Narducci. We express our gratitude to these lawyers who, in volunteering their services to assist impecunious defendants, not only render invaluable aid to the court but exemplify standards of high professional responsibility.

We unanimously affirm the convictions of Peter Casella and of Lorenzo Orlando; and of James Santore upon Counts One, Three and Five, and of Joseph Lo Piccolo on Count Five. We affirm the convictions of Emilio D'Aria

and James Leo Massi, Judge Hand dissenting. We reverse the convictions of Anthony Edward Tarlentino and Nicholas Narducci, and the convictions of James Santore and Joseph Paul Lo Piccolo on Count Two, Judge Byers dissenting.

HAND, *Circuit Judge* (dissenting as to D'Aria and Massi):

I agree with the opinion of Judge Waterman with one exception, i.e., I do not think that "possession" in the last paragraph of Sec. 174 of Title 21, U. S. Code, includes "constructive possession." I understand by "possession," as that term is commonly used in the law, either actual custody of the chattel, or at least that relation to the custodian that makes him unconditionally subject to the "possessors" demand for custody. I am of course aware that the outlines of the conception are not sharply drawn, but it seems to me that D'Aria and Massi did not have "possession" in the sense required. In the case at bar by adding "constructive possession" we give very important added advantage procedurally to the case for the prosecution, which it seems to me is unwarranted for reasons I shall try to state.

The paragraph in question creates more than a "presumption" for that would require no more than that the accused should put in some evidence that he had not dealt with the drugs in any of the ways forbidden. As I read the paragraph, "possession" by itself will support a conviction unless the accused "explains the possession to the satisfaction of the jury," which in the end comes to saying that the burden of proof shifts to him to establish his innocence, once he is shown, not only to be in "possession" at the time of the forbidden dealings, but to have ever been in possession in the past. Assuming that such a statute

would be constitutional, which, I submit, is not wholly free from doubt, it appears to me that at least the language should be explicit that "possession" has some other than the usual meaning. We must remember further that, not only is this a criminal statute, but that the penalties prescribed are extremely heavy.

Moreover, I find confirmation for my interpretation in the fact that when in 1914, five years later, Congress made dealing in narcotics lawful under specified conditions, among which was the "registry" of the dealers (Sec. 4722, Title 26, U. S. Code), it provided that "possession or control" should be presumed to be a violation of that act (Sec. 4724c, Title 26, U. S. Code), unless the dealer had "registered"; it did not shift the burden of proof. It is therefore clear that in that statute at least "possession" was used in its ordinary sense, and that, when Congress meant to include "constructive possession," it added the phrase, "or control."

I agree that it does not necessarily follow that in 1909 the word may not have been used more comprehensively; but I submit that it is significant that, when dealing with the same subject matter—narcotic drugs—the same word was used so as to exclude "constructive possession." Moreover, Sec. 4734 of Title 26 provides that Sec. 4722—among other sections—shall not "impair, alter, amend or repeal" any part of the Act of 1914. I agree that this language means that whatever was "possession" under Sec. 174 remains "possession" under the Act of 1914, but, I cannot see how that helps to define what was "possession" under Sec. 174. Not only does it beg the question to assume that the word had the same meaning in both statutes, but it makes redundant the addition of the words, "or in control," in 1914. I can see no reason to imply that these were added merely to make assurance doubly sure. As I have said, the Act of 1909 imposed much heavier penalties, and

procedural consequences of the "possession" were more drastic.

It is true that we have twice spoken as though "constructive possession" was enough under Sec. 174 (*United States* v. *Cohen*, 124 Fed. (2) 164, *United States* v. *Moia*, 251 Fed. (2) 255); but in both cases, "possession," *stricti juris*, was proved and what we said was *obiter*. On the other hand in *United States* v. *Landry*, 257 Fed. (2) 425 (1958) the Seventh Circuit decided that control by the accused over the custodian of narcotics was not alone enough to put the accused in "possession" under Sec. 174. In that case the control was more immediate than that of D'Aria and Massi in the case at bar. The point appears to me therefore to be still open for discussion.

To sum up I do not say that it would be unconstitutional to make "possession or control" enough to shift the burden of proof; but, I do think that if the intent was so far reaching, it was necessary to be more explicit as was done in the Act of 1914.

BYERS, *District Judge* (concurring in part, and dissenting in part):

The travail of this adjudication has wrought a diversity of opinion in the court as to correct disposition of the appeal of certain of the defendants; as a result it seems to be requisite that the views of each component of the court be made a matter of record.

I concur in the affirmance of the convictions of Casella, D'Aria, Massi and Orlando.

I concur in the conviction of Santore on counts One, Three and Five, and dissent from the reversal of his conviction on count Two, and would affirm as to that.

I concur in the conviction of Lo Piccolo on count Five, and dissent from the reversal as to him on count Two, and would affirm.

I dissent from the reversal of the convictions of Narducci and Tarlentino.

The reasons upon which the foregoing are based can be briefly stated:

At the outset it is to be remembered that this court is unanimous in holding that there was one conspiracy as charged in the indictment, and that all of these defendants were parties to it. The analogy to a partnership is of course not complete, but that terminology is deemed to be sufficiently apt to indicate the true relationship of defendants one to the other.

Since the agreement which the law perceives under such circumstances becomes visible in the acts of those who carry it into effect, the precise roles assigned to each are seldom if ever entirely revealed.

This means that it is an overambitious task to spell out to a nicety the exact allocation of duties of each individual in the performance of the joint task. It may be doubted if the inner workings of such a conspiracy are strictly organized. Probably individual performance is improvised on consent, according to the exigencies attending the delivery of a given package of the contraband.

If the foregoing betrays a reasonably correct understanding of such operations as this court is now dealing with, it would seem to follow that the conspiracy itself is the basic element of the picture as a whole, and once that has been found to be present, such details as "constructive possession" as opposed to manual possession, are of unimportant significance.

It is with true deference that I venture to suggest that Judge Hand's conception of "possession" as meaning "either actual custody of the chattel, or at least that relation to the custodian that makes him unconditionally subject to the 'possessor's' demand for custody" is not dispositive in dealing with the members of such a criminal conspiracy as this.

In such a matter it seems to me that it is each individual's relation to the contraband (not to one who may be temporarily its custodian) upon which the issue of possession turns. Since the contraband is in the joint custody of all, and since it may pass from hand to hand within the group—and probably does—as circumstances may dictate, the prosecution should not be called upon to prove who it was at a given instant of time that possessed any capacity to make the demand referred to in the foregoing quotation.

The enforcing authorities ought not to be required at all times to be adept at reading the details of what is by its very nature, a thimblerig enterprise.

Once such a joint and coordinated activity has been disclosed, as it was in this case, the later developments must be judged in the light of the partnership relationship so established, because as the law sees it, the conspiracy is not obliterated by the substantive offenses. It seems that the partnership relation, not that of principal and agent, points the path to decision.

That is in outline the premise from which the conclusions hereinabove stated are reached.

SANTORE.

This dissent has to do with the reversal as to count Two, the sale of December 11, 1957 which was accomplished through the placing of 16 ounces 390 grains of heroin in a

bureau drawer in the agents' room at the Hotel Edison. To quote from Judge Waterman's careful recital of the facts, Casella had visited Lo Piccolo's apartment where the contraband had been cached:

> "Upon his (Casella's) return to the hotel where Santore, Marshall (agent) and Picini (agent) were waiting he said that the drugs would be delivered that evening at 9:00 P.M. *It was agreed* (emphasis supplied) that the drugs were to be placed in a bureau drawer in the agents' room at the Hotel Edison while they were absent from it."

Again:

> "No one had gone into the agents' room except Ignazio Orlando. When the agents looked in the bureau they found a package containing a half-kilo of heroin. Picini then, at Casella's direction, gave $6,000.00 to Santore."

To me, the above recited agreement to which Santore was evidently a party, and the finding of his membership in the conspiracy, plus the payment to him of $6,000.00, made him an active and controlling participant in the elaborately concealed delivery.

He had sufficient control over that movement to collect the proceeds upon its successful completion. In other words, he was of managerial status in the enterprise, and should be so dealt with.

LO PICCOLO.

Again there is a reversal as to count Two (the said sale of December 11, 1957).

This was the subject of a conversation on the previous evening; the said agents and Santore and Casella, while

dining, were discussing a purchase of heroin. Lo Piccolo entered the restaurant, and Casella joined him but apart from the others. After those two talked, Casella returned to the group and stated that all desired arrangements had been made.

The court's opinion contains the following:

> "Despite his vehement protestations to the contrary, there is no doubt in our minds that the government established his participation in that sale (Dec. 11, 1957) and that he was a member of the peddling conspiracy."

Despite the foregoing, the opinion later says: that there was no evidence that Lo Piccolo ever possessed heroin as early as December 11, 1957, physically, or by controlling the disposition of it, or otherwise.

It seems to me that the foregoing is inconsistent with the evidence. The heroin is shown to have been removed from Lo Piccolo's apartment by young Orlando. Casella did not report to the agents on December 11 that the heroin would be delivered at the agents' room as has been stated, until he had visited the apartment building where Lo Piccolo lived. If Lo Piccolo did not have custody and control over his own apartment, it is to be supposed that he would have submitted testimony to that effect. Of course the version that young Orlando would have given, touching his removal of the contraband from Lo Piccolo's apartment and delivery to the agents' room, has not been revealed, but in my opinion it was not needed.

Lo Piccolo's place in the conspiracy having been shown, it matters not whether he secreted the heroin as shown, of his own volition, or because Casella told him to. While it was in his apartment, he had sufficient possession of it to enable him to summon the authorities to relieve him of it,

or otherwise dispose of it so as to frustrate the purpose of his talk on the previous evening with Casella. Of course he did neither.

It is required of a trial judge that he be fair and impartial, but not that he be feeble-minded.

I think Judge Noonan was right in convicting Lo Piccolo on this count, and therefore I would affirm.

TARLENTINO AND NARDUCCI.

This court reverses as to counts Four and Five. The former charges these defendants with possession on January 21, 1958 of over six pounds of heroin, and with the conspiracy as charged in count Five.

As to the latter, this court finds these defendants to have been guilty, but nonetheless reverses their conviction. I can imagine no more triumphant *non-sequitur*.

In dealing with count Four, it is to be remembered that the said package of heroin was found in Napolitano's (not a defendant named) car on January 21, 1958. The facts show that on the previous evening these defendants drove to the place where Napolitano's car (in which the package had been placed) was parked; Tarlentino remained in the car in which they arrived while Narducci went to that of Napolitano, opened the trunk, lifted the package, and while in the act of so doing became aware of the presence of certain agents, dropped the package back into the trunk, and rejoined Tarlentino.

Thus the character and contents of the package have been shown, and the conduct of these two defendants in seeking to further its delivery is clearly revealed. Since it is familiar law that success need not attend the object of a conspiracy in order to establish its existence, I fail to see how the reversal as to the Fifth count can be justified.

The court's opinion states that "there was no evidence whatsoever to indicate that they had knowledge that the drugs in the package were contraband, and because we are not able to say from the record that they were ever in possession, actual or constructive, of that package . . . ."

As to the possession, there was a joint effort to further delivery, by the approach to Napolitano's car. If they had not known what was in its trunk, the errand was of no apparent purpose. The grasping of the package by Nardinci was either with knowledge of its character, or in ignorance of it. There is no middle ground. That temporary possession was surrendered, but for a brief period of time it existed. The replacement of the package was consistent only with a purpose of concealment, and otherwise would not have been resorted to.

This circumstantial evidence was not consistent with innocence in any degree that is perceptible to me.

Thus as to these defendants I would affirm as to both counts.

In sum, it seems to the writer that the case comes before this court clothed with the usual immunity from reversal in the absence of a showing that the decision of the trial judge was clearly erroneous. To my mind it was clearly correct, and should be affirmed in its entirety.